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Supreme Court, U.S.
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No. 97-663

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

NEWSWEEK, INC.,

Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, LAWRENCE H. FUCHS, and ROBERT F. MILLIGAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FIRST DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Florida's doctrine of *res judicata* was properly applied to Newsweek's refund claim in this case.

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STATEMENT OF THE CASE

This case involves the application of the doctrine of res judicata to Newsweek's refund claim. The Florida Supreme Court's decision in Department of Revenue v. Magazine Publishers of America, 604 So. 2d 459 (Fla. 1992) is both stare decisis and *res judicata* to Newsweek. These issues were the only grounds for the State's Motion for

Summary Judgment and the trial court granted summary judgment only on those grounds. The District Court of Appeal, while addressing an issue raised only by Newsweek, affirmed the trial court's final judgment.

A. MAGAZINE PUBLISHERS OF AMERICA, INC.

On July 6, 1988, Magazine Publishers of America ("MPA") filed an action against the Florida Department of Revenue in the Second Judicial Circuit Court. MPA challenged the constitutionality of the sales tax imposed on magazines, Case No. 88-2442. It asserted that an invalid discrimination between magazines and newspapers existed. The sale of a magazine was taxable under Sec. 212.05, Fla. Stat. (1987). However, the sale of a newspaper was exempt under Sec. 212.08(7)(w), Fla. Stat. (Supp. 1988). MPA sought a declaratory judgment that it was unlawful to tax magazines while exempting newspapers.

In their lawsuit, MPA described itself as "a national trade association comprising 213 magazine publishers who publish 801 magazines sold at newsstands and by subscription." MPA admitted it was a "New York non-profit corporation." Id. MPA described the activities of its members stating that "MPA members, . . ., *are* subject to the

magazine sales tax pursuant to Sec. 212.05(1)(i), Fla. Stat.

Prior to the lawsuit, Sec. 212.05(1)(i), Fla. Stat. (1987), had been adopted and it imposed a tax on the sale and purchase of magazines. The law had taken effect on January 1, 1988. At the time MPA filed the suit on behalf of its members, the tax on the sale of magazines had been in effect for six (6) months. During this time, Sec. 212.08(7)(w), Fla. Stat. (Supp. 1988), *exempted* the sale or purchase of a newspaper from the imposition of the sales tax under Sec. 212.05, Fla. Stat. MPA alleged that the tax on the sales of its members' magazines under Sec. 212.05(1)(i), Fla. Stat., was unconstitutional on its face, and as applied, in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, Secs. 2 and 4 of the Florida Constitution. MPA's complaint was grounded on the fact that the sale of a magazine was **taxed**, while the sale of a newspaper was **exempt**.

For relief, MPA sought two remedies from the trial court:

a. a declaration that Sec. 212.05(1)(i), Fla. Stat. (1987), was unconstitutionally "void on its face"; and
b. an injunction restraining the Florida Department of Revenue from collecting the

sales tax imposed on the sale of magazines by Sec. 212.05(1)(i), Fla. Stat. (1987).

The MPA requested the trial court to void the tax on the sale of magazines, Sec. 212.05(1)(i), Fla. Stat., and to enjoin the Department from further collecting sales tax on the sale of magazines. MPA sought an extension of the exemption enjoyed by the newspapers; MPA did not seek invalidation of the newspaper exemption under Sec. 212.07(8)(w), Fla. Stat. *MPA did not request or seek a refund of the tax remitted on the sale of magazines in Florida pursuant to Sec. 212.05(1)(i), Fla. Stat.*

The MPA moved for Summary Judgment. In its supporting memorandum MPA again asserted that "[m]embers of Plaintiff Magazine Publishers of America. . . , publish [magazines] that are sold in Florida and that Defendant Department of Revenue (DOR) contends are subject to the sales tax." MPA repeated that it was "a national trade association comprised of 213 publishers. . . ." In further support of MPA's status as representative of all the members of MPA, MPA filed the affidavit of its then President, a copy of MPA's By-laws and a copy of MPA's Mission Statement. MPA specifically recognized the instant

Petitioner, Newsweek, Inc., as a member of the association and sought to protect its rights.

On November 8, 1989, the trial court rendered an order granting the MPA's Motion for Summary Judgment. The Florida trial court found that the exemption for newspapers, Sec. 212.08(7)(w), Fla. Stat., unlawfully discriminated against the MPA. To eliminate the discrimination, the trial court struck Sec. 212.05(1)(i), Fla. Stat. The trial court *extended* the exemption contained in Sec. 212.08(7)(w), Fla. Stat., to include the sale of magazines.

Upon first review, the Florida Supreme Court found that the sales tax unlawfully discriminated against magazines by treating some periodicals differently than other periodicals. Department of Revenue v. Magazine Publishers of America, 565 So. 2d 1304, 1307 (Fla. 1990) (hereinafter Magazine Publishers I). The Court then found, applying the "strict scrutiny" test, that the discrimination was not legal. Id., at 1308. The Supreme Court of Florida affirmed this part of the decision below. Id., at 1309.

However, upon review of the remedy created below, the Supreme Court of Florida expressly rejected the finding

that the "tax on magazines . . . must be stricken to remedy the constitutional defect." Id. , at 1309 (Further stating "[i]t does not follow from this that it is the tax on magazines that is unconstitutional.") The Court stated that "magazines are not singled out for taxation." Id.

The Court looked to Florida law to determine the proper remedy for the situation. Id., at 1310. The Supreme Court of Florida found that the Legislature had already determined that the courts of the State were to look to Sec. 212.21, Fla. Stat., in crafting a remedy. The Court ruled that this statute stood for the proposition that the courts were to favor preserving the tax over expanding an exemption. Id. The Supreme Court determined that the proper remedy available to the MPA was to strike the exemption granted to the newspapers under Sec. 212.08(7)(w), Fla. Stat. Id., at 1309. The Court's decision rendered the sale of newspapers subject to the Florida Sales Tax and retained the tax on the sale of magazines.

Intervenor Miami Herald sought review by this Court of the Florida Supreme Court's decision. This Court granted Miami Herald's petition for a writ of certiorari, vacated the Florida Supreme Court's first decision, Magazine Publishers

I, and remanded the case back to the Supreme Court of Florida so that the Florida Supreme Court could reconsider its decision in light of this Court's then recently announced opinion in Leathers v. Medlock, 499 U.S. 439 (1991). Miami Herald Publishing Co. v. Department of Revenue, 499 U.S. 472 (1991).

Upon remand, the Supreme Court of Florida reexamined its earlier decision in light of Leathers. After restating its earlier findings and holdings, the Court found that the Florida sales tax itself did not violate the First Amendment because it did not single out the press for special treatment. Department of Revenue v. Magazine Publishers of America, 604 So. 2d 459, 461 (Fla. 1992) (hereinafter Magazine Publishers II). The Florida Supreme Court again found, however, that the exemption granted to the newspapers by Sec. 212.08(7)(w), Fla. Stat., caused an unlawful discrimination. It pointed out that the way that exemption was being administered was based upon the content of the publication. Magazine Publishers II, 604 So. 2d at 461-462. Once again the Florida Supreme Court affirmed the finding of an invalid discrimination under the State taxing scheme between newspapers and magazines.

Id. at 463.

Having again found the tax scheme flawed, the Florida Supreme Court held that the Leathers decision did not require any alteration in the Supreme Court of Florida's earlier decision as to the appropriate remedy in the case. Magazine Publishers II, 604 So. 2d, at 463. The Supreme Court of Florida held that "Sec. 212.21 makes it clear that as between the imposition of the tax or the granting of an exemption, the tax shall prevail." Id. The Supreme Court again reversed that part of the trial court's Final Summary Judgment striking the tax. It ordered that the exemption for newspapers be stricken instead. Magazine Publishers II, at 464.[1]/

B. NEWSWEEK

During the periods in question, Newsweek sold magazines in Florida. During the periods in question, Florida imposed a sales tax upon the sale of magazines. Sec. 212.05, Fla. Stat. The sales tax is imposed upon the ultimate consumer of the product. Sec. 212.07(1)(a), Fla. Stat.

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[1]/ The Supreme Court's ruling also struck the injunction against the Department which had restrained the Department from collecting the tax upon the sale of magazines.

Pursuant to Sec. 212.07(2), Fla. Stat., Newsweek, when acting as a dealer in tangible personal property, is required to add the tax to the retail price of magazines and to collect the sales tax from the retail purchaser. Furthermore, pursuant to Sec. 212.07(4), Fla. Stat., it is unlawful for a dealer such as Newsweek, to absorb the sales tax or otherwise relieve the consumer of the payment of all or part of the sales tax. Thus, Newsweek, as a dealer, had the statutory obligation to charge and collect, as well as remit, the sales tax imposed by Sec. 212.05, Fla. Stat., on the sale of its magazines in Florida.

Newsweek voluntarily chose not to follow clear and unambiguous Florida tax law. Instead, Newsweek made the business decision to ignore Florida law and absorb the Florida sales tax. In direct violation of Florida law, Newsweek refused to add the amount of the tax to the sales price, as required by Sec. 212.07(2), Fla. Stat. See Gaulden v. Kirk, 47 So. 2d 567 (Fla. 1950). Newsweek sought to create an injury to be taken before a court.

Following Magazine Publishers I, Newsweek filed a refund application with the State on January 1, 1991. The refund application, filed pursuant to Sec. 215.26, Fla. Stat., sought a refund of the sales tax Newsweek paid to the State

on account of magazine subscription sales for the period of January 1, 1988 through November 30, 1990.

The State denied Newsweek's refund application on December 28, 1994. Attached to the refund denial, was a typewritten explanation of the reason for the denial of Newsweek's claim. Appendix 1. The document explained that the denial was based on the Supreme Court of Florida's decision in Magazine Publishers II, and the fact that decision changed a long line of Florida Supreme Court decisions upholding the newspaper exemption. Therefore, the effect of the ruling was, as the Supreme Court of Florida had determined, prospective only. The refund denial and attached explanation, made no mention of any failure on the part of Newsweek to take advantage of any statute affording a predeprivation remedy. The denial explained Newsweek's rights as they existed under Sec. 72.011, Fla. Stat., to judicially challenge the denial of the refund.

Newsweek brought this action in the Florida circuit court on May 26, 1995. The State answered the complaint on October 16, 1995. The answer does not assert that Newsweek should be denied a refund because Newsweek failed to take advantage of any statute affording a

predeprivation remedy.

During discovery Newsweek admitted that during the years 1988 through 1992, Newsweek was a member of the MPA. It paid money, in the form of dues or maintenance, to MPA as part of Newsweek's membership requirements and responsibilities. Various officers of Newsweek served on the Board of Directors of MPA. It paid money, in the form of dues or maintenance, in excess of $200,000.00, including a special assessment for reimbursement of a portion of MPA's costs in litigating Magazine Publishers. It admitted that it has always been aware of MPA's Mission Statement and the particular mission "[t]o advocate and litigate on behalf of the industry." As a member of MPA, it has always been aware of MPA's by-laws and that it has not withdrawn its membership in MPA. As a member of MPA, it was aware of MPA's litigation efforts and the results in Magazine Publishers of America, Inc. v. The Department of Revenue, 2nd Judicial Circuit, Case No. 88-2442 and Department of Revenue v. Magazine Publishers of America, 604 So. 2d 459 (Fla. 1992). It admitted that it did not intervene in the case of Magazine Publishers of America, Inc. v. The Department of Revenue, 2nd Judicial Circuit, Case No. 88-2442, at any

time during the pendency of that case. Nor did it remove itself from among those benefitting from MPA's representation of its members in the case of Magazine Publishers of America, Inc. v. The Department of Revenue, 2nd Judicial Circuit, Case No. 88-2442, at any time during the pendency of that case. Finally, it admitted that it paid sales tax out of Newsweek's own funds and did not collect the sales tax from its magazine subscribers in Florida.

At the close of discovery both parties moved for summary judgment on November 9, 1995. The State based its argument on the fact that Newsweek was barred by res judicata in light of the Magazine Publishers II decision and on the argument that the Supreme Court of Florida announced that its remedy was prospective only. Appendix 2. At no time in the State's motion for summary judgment did the State assert that Newsweek should be denied a refund because Newsweek failed to take advantage of a statute granting a predeprivation remedy.

Newsweek itself first interjected the question of the supposed lack of a proper predeprivational remedy under

Florida law in its motion for summary judgment.[2]/

The trial court issued its ruling on April 12, 1996. The court granted the State's motion for summary judgment and denied Newsweek's. Appendix 3. The trial court granted the State's motion "for the reasons, arguments and the authorities contained therein. . . ." In so doing, the court affirmed the State's argument that Newsweek was barred by res judicata and that the Magazine Publishers II decision answered the matter fully.

Since the State did not assert in its motion for summary judgment that Newsweek should be denied a refund because Newsweek failed to take advantage of one of Florida's predeprivational remedy statutes, the trial court did not rule that Newsweek had failed to take advantage of one of Florida's predeprivational statutes. The issue of the availability of a predeprivational remedy was not a basis for the trial court's order.

Newsweek appealed the trial court's decision to Florida's First District Court of Appeal. Again, it was

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[2]/ Only in response did the State even discuss predeprivational remedies in Florida.

Newsweek that inserted the discussion of a predeprivational remedy into the discussion by making the argument in its initial brief. The State answered by arguing that the case should be affirmed based upon res judicata and due to the State's good faith reliance upon prior decisions of the Supreme Court of Florida construing the exemption for newspapers. The State restricted its response to Newsweek's predeprivation argument to one paragraph of its answer brief.

REASONS FOR DENYING THE WRIT

The writ should be denied because denial of Newsweek's refund is clearly consistent with the decisions of this Court. This case simply involves the application of the doctrine of res judicata to Newsweek's refund claim. There is no need to address the issue raised by Newsweek. The Petitioner properly filed an application for a refund, was denied by the State and the denial was affirmed by the trial court. The denial was affirmed by the Florida district court of appeal on grounds having nothing to do with the issue here raised by Newsweek.

Newsweek brought a refund application pursuant to Sec. 215.26, Fla. Stat. The State acted on that application and followed the refund procedures described under Sec. 215.26, Fla. Stat., while addressing Newsweek's application. The application was denied in accordance with Sec. 215.26, Fla. Stat.

Unfortunately, the State must address the implication made by Newsweek and the *amici* that the "State" played some sort of "bait and switch" tactic on Newsweek and the outcome in this case should be determined by this Court's decision in Reich v. Collins, 513 U.S. 106 (1994). Simply

put, issues involving the existence of a predeprivational remedy were not raised by the State in the administrative or judicial forum. The State did not assert that Newsweek should be denied a refund because Newsweek failed to take advantage of a statute affording predeprivation relief. The State narrowly asserted that Newsweek was barred from a refund by *res judicata* and the decision in Magazine Publisher II. As such, this case is not controlled by the decision in Reich v. Collins. Newsweek invited the result below. The State will not engage in speculation as to why Newsweek continues to raise these self-described "key" constitutional questions.

An additional supporting denial of a writ is worth mentioning. Newsweek attempts to convince this Court that the State of Florida is not following the Court's holding in McKesson v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990), and that it did not follow this Court's judgment in McKesson itself. See, n.8, p.13. Newsweek alleges that:

> This Court's reversal . . . was never implemented. The liquor tax was never imposed retrospectively on those unconstitutionally exempted, and those who paid the tax were never issued refunds.

In fact, quite the contrary occurred. The State of Florida, following this Court's opinion, did assess those who had received the benefit of the preferred tax rate. The State announced the enactment of three Emergency Rules, Rule No. 7AER91-8, Rule No. 7AER91-9, and Rule No. 7AER91-10. On April 2, 1991, the Department mailed out a tax assessment and a copy of the emergency rules, via certified mail, return receipt requested, to each of the 52 distributors that had dealt in the preferred products between July 1, 1985 through June 30, 1988. Appendix 4, Affidavit of Robert Kronmiller, dated May 20, 1992, filed in McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, No. 86-2997, 2nd Judicial Circuit. The amount assessed came to $8,199,966.[3]/ At the same time, the

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[3]/ As a result of the Department's April 2, 1991, "mail out":

A. Nine distributors paid their special assessments;
B. Thirty-two distributors challenged their assessment in Circuit Court;
C. One distributor was in bankruptcy;
D. One assessment was returned to Department as undeliverable; and
E. Nine distributors, received notice, but did not challenge nor pay their special assessment.

See Appendix 4 at pages 21-22.

same 52 distributors filed refund applications exceeding $300,000,000.

After proceeding to the trial court and while the matter was on appeal, all the parties, including McKesson, settled all outstanding claims between the State and the distributors, with the exception of Tampa Crown Distributor. As to Tampa Crown, contrary to the implication of n.8, the district court of appeal decided that Tampa Crown, because of res judicata with respect to the original decision of the Supreme Court of Florida in Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, 524 So. 2d 1000, 1010 (Fla. 1988), had no standing to seek a refund. Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, 643 So. 2d 16 (Fla. 1st DCA 1994), aff'd sub nom. Tampa Crown Distributors, Inc., v. Division of Alcoholic Beverages and Tobacco, et al., __ U.S. __, 115 S.Ct. 1795 (1995). Appendix 5.

Further, not only did the State follow this Court's holding in McKesson, it followed the holding explicitly in the case of Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994). Kuhnlein concerned a challenge to Sec. 319.213, Fla. Stat., and the $295.00 impact fee imposed upon

motor vehicles first titled in another state. The Florida Supreme Court struck the statute finding the law violated the Commerce Clause to the United States Constitution. The Supreme Court of Florida then reviewed what the proper remedy must be under McKesson. Since the statute was found to be *void ab initio*, and there was no way the State could correct the discrimination, the Supreme Court ordered a full refund of all the fees collected. Kuhnlein, 646 So. 2d, at 726-727. The State set up a procedure to locate and confirm all those who paid the fee. The State has refunded most of the $189 million collected.

Therefore, contrary to the implications of Newsweek and the amici, Florida is not disregarding this Court's holdings. The State is following all of the decisions of this Court including, but not limited to, McKesson.

I. FLORIDA LAW DID NOT CONTEMPLATE NEWSWEEK PAYING THIS TAX; NEWSWEEK PLACED ITSELF IN ITS CURRENT POSITION BY VIOLATING FLORIDA TAX LAW

Newsweek sold magazines in Florida during a time

when they were subject to tax. Section 212.05, Fla. Stat.[4]/ Newsweek, as the seller of tangible personal property, is a "dealer."[5]/ Sales tax is intended to be separately stated and collected from the retail consumer of the product. Section

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[4]/ Section 212.05, Fla. Stat., entitled "Sales, storage, use tax," states in pertinent part:

It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

(a)1. a. At the rate of 6 percent of the sales price of each item or article of tangible personal property when sold at retail in this state, computed on each taxable sale for the purpose of remitting the amount of tax due the state, and including each and every retail sale.

[5]/ Section 212.06(2)(c), defines "dealer" "every person, as used in this chapter, who sells at retail or who offers for sale at retail, or who has in his or her possession for sale at retail; or for use, consumption, or distribution; or for storage to be used or consumed in this state, tangible personal property as defined herein, including a retailer who transacts a mail order sale."

212.07(1)(a), Fla. Stat.[6]/; Section 212.07(2), Fla. Stat.[7]/ Only if a purchaser does not pay the sales tax or the dealer refuses to collect the tax, does a dealer become liable for the payment of the Florida sales tax.[8]/ In fact, it is a crime to refuse to impose and collect the sales tax from purchasers.[9]/

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[6]/ Section 212.07(1)(a), Fla. Stat., states "[t]he privilege tax herein levied measured by retail sales shall be collected by the dealers from the purchaser or consumer."

[7]/ Section 212.07(2), Fla. Stat., states, in pertinent part, "[a] dealer shall, as far as practicable, add the amount of the tax imposed under this chapter to the sale price, and the amount of the tax shall be separately stated as Florida tax on any charge ticket, sales slip, invoice, or other tangible evidence of sale. Such tax shall constitute a part of such price, charge, or proof of sale which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts."

[8]/ Section 212.07(2), Fla. Stat., states, in pertinent part, "[e]xcept as otherwise specifically provided, any dealer who neglects, fails, or refuses to collect the tax herein provided upon any, every, and all retail sales made by the dealer or the dealer's agents or employees of tangible personal property or services which are subject to the tax imposed by this chapter shall be liable for and pay the tax himself or herself."

[9]/ Section 212.07(3), Fla. Stat., states "[a]ny dealer who fails, neglects, or refuses to collect the tax herein provided, either by himself or herself or through the dealer's agents or employees, is, in addition to the penalty of being liable for and paying the tax himself or herself, guilty of a misdemeanor of the first degree, punishable as provided in s.

In order to protect the integrity of the sales tax system and to prevent an appearance of economic advantage among some sellers of tangible personal property, Sec. 212.07(4), Fla. Stat., prohibits a dealer, such a Newsweek, from absorbing the sales tax or relieving the consumer of the payment of all or part of the sales tax. Section 212.07(4), Fla. Stat.[10]/ Thus, Newsweek, as a dealer, had the statutory obligation to charge and collect the tax imposed by Sec. 212.05, Fla. Stat., on the sale and purchase of its magazines from those purchasing its magazines, pursuant to Sec. 212.07(1)(a), Fla. Stat.

Newsweek did not add the amount of the tax to the

775.082 or s. 775.083."

[10]/ Section 212.07(4), Fla. Stat., states "[a] dealer engaged in any business taxable under this chapter may not advertise or hold out to the public, in any manner, directly or indirectly, that he or she will absorb all or any part of the tax, or that he or she will relieve the purchaser of the payment of all or any part of the tax, or that the tax will not be added to the selling price of the property or services sold or released or, when added, that it or any part thereof will be refunded either directly or indirectly by any method whatsoever. A person who violates this provision with respect to advertising or refund is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. A second or subsequent offense constitutes a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083."

sales price, as required by Sec. 212.07(2), Fla. Stat. It chose to violate Sec. 212.07(4), Fla. Stat., by refusing to separately charge the sales tax[11]/. See Gaulden v. Kirk, 47 So. 2d 567 (Fla. 1950). Newsweek made the deliberate choice to violate clear and unambiguous Florida tax law. Newsweek voluntarily created the injury of which it now complains.

II. THE FLORIDA COURTS CORRECTLY HELD THAT NEWSWEEK'S CLAIM FOR REFUND IS BARRED BY *RES JUDICATA*

This case involves the application of the doctrine of res judicata to Newsweek's refund claim. The Florida Supreme Court's decision in Magazine Publishers II, is both stare decisis and *res judicata* to Newsweek. These issues were the only grounds for the State's motion for summary judgment and the trial court granted summary judgment only on those grounds. The District Court of Appeal, while addressing an issue raised only by Newsweek, affirmed the trial court's final judgment. Newsweek, Inc., v. Department of Revenue, 689 So. 2d 361 (Fla. 1st DCA 1997), Appendix 6.

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[11]/ Thus, *amici*'s assertion that Newsweek "legally collected the tax" is just not true. Newsweek "collected" no sales taxes whatsoever; it improperly paid the taxes from its own funds.

The trial court granted Final Summary Judgment in all areas urged by the State. It did so "for the reasons, arguments and the authorities contained therein, . . ." Appendix 3. The State moved for summary judgment based, primarily, on the doctrine of *res judicata*. Appendix 2. The Magazine Publishers II opinion held that the appropriate remedy to the discrimination occasioned by administration of the newspaper exemption in Florida was to strike the exemption. Magazine Publishers II. Since the Florida Supreme Court determined the proper remedy, under the doctrine of stare decisis, the trial court was bound by the Florida Supreme Court's decision in Magazine Publishers II.

The trial court determined that Newsweek's refund action is barred by the doctrine of *res judicata* because Newsweek was a member of MPA. When MPA brought an action on behalf of its members regarding the same issues raised in Magazine Publishers of America, Inc. v. Department of Revenue, 2nd Judicial Circuit Court, Case No. 88-2442, the MPA represented the legal interests of all its members. The facts and circumstances of this case are identical to those in Magazine Publishers II, the only difference being the form of relief requested by Newsweek.

MPA did not seek a refund of tax paid by its members. Since a refund for its members could have been sought by MPA, the trial court determined that Newsweek is now barred from requesting a refund in the instant action.

Newsweek did not withdraw itself from representation by MPA in that suit. The trial court determined that the necessary elements to show *res judicata* were present below. The summary judgment found that, as a matter of State law, the judgment in Magazine Publishers II conclusively established the remedy for the discrimination found by that Court to exist.

Under Florida law, the general principle behind the doctrine of "res judicata" is that a final judgment of a court of competent jurisdiction is absolute and puts to rest every justiciable, as well as every actually litigated issue. Albrecht v. State, 444 So. 2d 8, 11-12 (Fla. 1984), (citing, Gordon v. Gordon, 59 So. 2d 40, 43 (Fla. 1952)).

Florida law recognizes that a class of persons, while not party to a particular suit, may be represented in that lawsuit by another. This form of representation is known as "virtual representation." Hinchee v. Fisher, 93 So. 2d 351, 353 (Fla. 1957) [overruled on other grounds]; Progressive American

Insurance Co. v. McKinnie, 513 So. 2d 748, 749 (Fla. 4th DCA 1987); Hardee v. Gordon Thompson Chevrolet, 154 So. 2d 174 (Fla. 1st DCA 1963); Gordon v. Gordon, 59 So. 2d 40, 43-44 (Fla. 1952); Nichols Engineering & Research v. State, 59 So. 2d 874 (Fla. 1952); Wolfson v. Rubin, 52 So. 2d 344, 346 (Fla. 1951). When the test of "virtual representation" is met, then the non-party can be bound by the doctrine of res judicata. Because of Newsweek's relationship with MPA and the prior litigation, the trial court determined that Newsweek was represented in Magazine Publishers II and could have raised all issues at that time. Newsweek chose its path and is now barred from bringing another lawsuit by *res judicata*.

CONCLUSION

The Department submits, for the foregoing arguments and authorities, that the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

JOSEPH C. MELLICHAMP, III
Senior Assistant Attorney General

ERIC J. TAYLOR*
Assistant Attorney General

Office of the Attorney General
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850/414-3300
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**Counsel of Record*

Counsel for Respondents

APPENDICES

APPENDIX 1

ATTACHMENT TO DR-1200R
CLAIM REFERENCE #: 91046022
$283,707.57: AMOUNT CLAIMED
$283,707.57: AMOUNT DENIED
$0.00: AMOUNT DUE

REASON FOR DENIAL:

The Florida Supreme Court's opinion in Department of Revenue v. Magazine Publishers explicitly resolves the question raised by your request for refund because it holds that the proper remedy under Florida law is to strike the exemption granted to newspapers. The Court did not find that a tax on magazines was objectionable. The remedy provided by the Florida Supreme Court did not entitle any litigant to a refund and was purely prospective. The United States Supreme Court decided in the case of James B. Beam Distilling Co. v. Georgia, 111 S.Ct. 2439 (1991), that application of a rule of law to litigants generally requires application of that rule to all others.

Reliance on McKesson Corporation v. Division of Alcoholic Beverages, 496 U.S. 18 (1990), in the current context is misplaced since that case considered a new enactment which attempted to circumvent the Court's clear precedent. McKesson described the circumstances under which a federal court would rest control over issues of remediation normally decided as a matter of state law - what the Court termed the constitutional threshold. See James B. Beam, supra. No such considerations came into play here. The newspaper exemption was longstanding and had been repeatedly scrutinized by Florida Courts. Thus the Florida Supreme Court has decided the appropriate remedy as a matter of state law in Magazine Publishers. That decision is

final and the remedy there announced does not authorize the Department to grant a refund under the circumstances described in your request. Under these circumstances, the Department lacks authority to grant you a refund under Section 215.26, Florida Statutes.

APPENDIX 2

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

NEWSWEEK, INC.,

Plaintiff,

v. CASE NO. 95-1971

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, a state agency,

and-

LAWRENCE H. FUCHS, as
Executive Director of the
Department of Revenue of the
State of Florida,

-and-

ROBERT F. MILLIGAN, as
Comptroller of the State of Florida,
Defendants.
_____/

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, Department of Revenue of the State of Florida, Lawrence H. Fuchs, as Executive Director of the

Department of Revenue of the State of Florida, and Robert F. Milligan, as Comptroller of the State of Florida, (collectively referred to as "the Department"), by and through undersigned attorneys, pursuant to Fla. R. Civ. P. 1.510, moves this Court for Summary Judgment in the above styled case, in that there is no dispute of any material facts and the Department is entitled to judgment as a matter of law, and for grounds would state:

Facts

1. Plaintiff, Newsweek, Inc., (hereinafter "Newsweek") filed a refund application with the Department on January 18, 1991, requesting a refund in the amount of $283,707.57, of sales taxes remitted on sales of magazine subscriptions for the period January 1, 1988 through November 30, 1990.[1] See, Complaint, p. 3, para. 8.

2. The Department, on December 28, 1994, denied Newsweek's refund request. See, Exhibit "B" attached to Newsweek's Complaint.

3. Thereafter, Newsweek brought this action against the Department seeking declaratory, monetary and injunctive relief and attorney fees pursuant to §§ 72.011, and 86.011

[1] Newsweek alleges that the sales taxes in question were paid by it and not collected from its subscribers. See, Complaint, p. 3, para. 8.

Fla. Stat., Art. I 2, 4 and 9, Fla. Const., the 14th Amendment to the U. S. Constitution and 42 U.S.C. §§ 1983 and 1988.

4. Newsweek now seeks a judicial determination of the validity of the Department's denial of Newsweek's refund request and seeks declaratory and injunctive relief alleging that the Department's denial of its refund request has deprived Newsweek of its "rights, privileges and immunities under the United States Constitution." Complaint, p. 3, para. 8.

5. The Department filed a Motion to Dismiss on the grounds that Newsweek failed to state a claim upon which relief may be granted, and that this Court lacked jurisdiction over the subject matter.

6. After a hearing, this Court, on September 30, 1995, issued an Order denying the Department's motion without prejudice.

7. The Department served its Answer and Affirmative Defenses and Defenses to Newsweek's Complaint on October 16, 1995, together with Interrogatories, a Request for Admissions and a Request for Production of Documents.

History of the Taxation of Magazines

8. Prior to 1988 all newspapers and magazines were subject to sales tax. Gasson v. Gay, 49 So. 2d 525 (Fla. 1950). See, also, §§ 212.08(6), and 212.08(7)(e), Fla. Stat. (1985).

9. In 1988 the Florida Legislature amended § 212.08, Fla. Stat., by removing the exemption for magazines, while retaining the exemption for newspapers. See, § 212.08(7)(w), Fla. Stat. (Supp. 1988).

10. Shortly thereafter, Magazine Publishers of America, Inc., (hereinafter "MPA"), brought an action on behalf of its members against the Department challenging the tax on magazine subscriptions and requesting that the Court judicially enact the same exemption enjoyed by the newspapers.

11. Newsweek, at the time of the Magazine Publishers suit, was a member of MPA. Furthermore, Newsweek is still a member of MPA.

12. In his Affidavit, Donald D. Kummerfeld, then President of MPA, states that a stated purpose of MPA is to "[S]ecure freedom from unjust and unlawful extractions . . . [f]urther in accordance with the Statement of Mission of the association, the association is authorized 'to advocate and litigate on behalf of the industry.'" Kummerfeld Affidavit, at para. 4.

13. This Court, on motions for summary judgment, entered Final Summary Judgment in favor of MPA finding that Ch. 212, Fla. Stat. (Supp. 1988), imposed "a differential tax on the press and singl[ed] out magazines for taxation while exempting newspapers." Magazine Publishers of America, Inc., et al., v. State, Department of Revenue, Case No. 88-2442, Final Summary Judgment at pp. 4-5, (Fla. 2nd Jud. Cir. November 8, 1989).

14. Having decided that Ch. 212, Fla. Stat. (Supp. 1988), treated magazines and newspapers differently, in that one was taxed and the other was exempt, this Court fashioned a remedy extending the exemption afforded to newspapers, to the magazines. See, § 212.08(7)(w), Fla. Stat. (Supp. 1988), Magazine Publishers of America, Inc., et al., v. State, Department of Revenue, Case No. 88-2442, Final Summary Judgment at p. 5, (Fla. 2nd Jud. Cir. November 8, 1989).

15. On appeal, the Florida Supreme Court affirmed the part of this Court's Final Summary Judgment that the statute in question differentiated amongst members of the media based upon the content of the publication. See, Department of Revenue v. Magazine Publishers of America, Inc., 565 So. 2d 1304, 1309 (Fla. 1990), vacated, Miami Herald Publishing Co. v. Department of Revenue, 499 U. S. 972 (1991), on remand, Department of Revenue v. Magazine Publishers of America, Inc., 604 So. 2d 459, 462 (Fla. 1992).

16. The Florida Supreme Court, when considering the proper remedy in that case, reversed the portion of this Court's Final Summary Judgment where this Court had fashioned an improper remedy by extending the exemption afforded the newspapers to the magazines and found:

> Accordingly, we affirm that portion of the trial court's order which holds that chapter 212 impermissibly burdens First Amendment rights and does not serve a compelling state interest. However, having concluded that under state law the appropriate remedy is to strike the newspaper exemption granted by section 212.08(7)(w), Florida Statutes (Supp. 1988), we reverse that portion of the trial court's order which concludes that the appropriate remedy is

to strike the tax imposed on magazines. Magazine Publishers of America, Inc., 604 So. 2d at 463-464.

Res Judicata

17. Newsweek's' action is barred by the doctrine of res judicata because Newsweek was a member of the Magazine Publishers of America, Inc. MPA brought an action on behalf of its members against the Department over the same issues in the case of Magazine Publisher of America, Inc. v. Department of Revenue, 2nd Judicial Circuit Court, Case No. 88-2442.

18. In that case, MPA did not seek a refund of any taxes paid by its members. Newsweek did not withdraw MPA's representation of Newsweek in that suit. No refund was ordered in that case and the Supreme Court of Florida determined the proper remedy in that case was to strike the exemption, permitting the tax to prevail. Department of Revenue v. Magazine Publishers of America, Inc., 604 So. 2d 459 (Fla. 1992).

19. The general principle behind the doctrine of "res judicata" is that a final judgment of a court of competent jurisdiction is absolute and puts to rest every justiciable, as well as every actually litigated issue. Albrecht v. State, 444 So. 2d 8, 11-12 (Fla. 1984), (citing, Gordon v. Gordon, 59 So. 2d 40, 43 (Fla. 1952)). However, res judicata applies only where all the principles of the doctrine are present. Id.

Thus, where the second suit is based upon the same cause of action and between the same parties, the first judgment bars the second. Gordon, 53 So. 2d at 44. For res judicata to apply, our Supreme Court requires that the following must occur simultaneously:

A. Identity of the thing sued for;
B. Identity of the cause of action;
C. Identity of the parties; and,
D. Identity of the quality in the person for or against whom the claim is made.

Albrecht, 444 So. 2d at 12.

20. In the present case, Newsweek's Complaint does not make any reference to the prior judicial action. MPA, as Newsweek's representative in the first action, and now Newsweek have both alleged the same primary wrong in both actions. Thus, it is clear what Newsweek seeks here is barred by the doctrine of res judicata. The earlier suit resulted in a final judgment; both Newsweek and the Department were involved in the earlier action. Most importantly, the same cause of action, based upon the same alleged infringement of rights and identical set of evidence, is presented in both suits. For this Court to grant the relief requested would impair the judgment rendered by the Supreme Court in the first action.

21. Newsweek has failed to state a claim upon which relief could be granted in that Newsweek claims that a refund of taxes is the only appropriate remedy. Newsweek fails to recognize that the Florida Supreme Court held that the appropriate remedy in that case was to strike the exemption, permitting the tax to prevail. Department of Revenue v.

Magazine Publishers of America, Inc., 604 So. 2d 459, 463 (Fla. 1992). With respect to any remedy, under the doctrine of stare decisis[2] this Court is bound by the Florida Supreme Court's decision of Department of Revenue v. Magazine Publishers of America, Inc., 604 So. 2d 459 (Fla. 1992).[3]

Civil Rights Claim

22. Newsweek's 42 U. S. C. § 1983 claim is barred because MPA's claim under 42 U. S. C. § 1983 was denied by an Order of this Court. A copy of the Final Order in Magazine Publishers of America, Inc., et al., v. State, Department of Revenue, Case No. 88-2442, (Fla. 2nd Jud. Cir. February 1, 1994), is attached to the Department's Request for Admissions, dated October 16, 1995. MPA appealed this order to the First District Court of Appeal, but subsequently withdrew its appeal.

23. This Court lacks jurisdiction over the subject matter because Newsweek has failed to state a claim upon which relief may be granted in this case in that:

(a) Newsweek is blocked by the very terms of § 1983, as 1983 only permits actions against "persons." A

---

[2] See, State v. Dwyer, 332 So. 2d 333 (Fla. 1976).

[3] See also, Gasson v. Gay, 49 So. 2d 525 (Fla. 1950); State ex rel. Nuveen v. Greer, 88 Fla. 949, 102 So. 739 (1924); and, George W. Davis and Sons, Inc., v. Askew, 343 So. 2d 1329 (Fla. 1st DCA 1977).

state or a state agency is not a "person" within the meaning of § 1983. Will v. Michigan Department of State Police, 491 U. S. 58, 109 S.Ct. 2304, 2309-2310 (1989). See also, Howlett v. Rose, 496 U. S. 356, 110 S.Ct. 2430, 2437 (1990).

(b) The First District Court of Appeal has decided on three occasions that the State, state agencies and state officials acting in their official capacity are **not** "persons" under 1983. Arney v. Department of Natural Resources, 448 So. 2d 1041, 1045 (Fla. 1st DCA 1984) (the State and DNR, "an arm of state government" were not "persons" within the meaning of 1983); Hambley v. State, Department of Natural Resources, 459 So. 2d 408, 410 (Fla. 1st DCA 1984)(citing Arney); and, Witmer v. University of Florida Police Department, 610 So. 2d 87, 88 (Fla. 1st DCA 1992). The Department has not waived and hereby claims its sovereign immunity in this case.

(c) Finally, the United States Supreme Court recently held that 42 U. S. C. § 1983 provided no basis for courts - whether federal or state - to issue injunctive or declaratory relief in a state tax case when there is an adequate state remedy at law. National Private Truck Council, Inc., v. Oklahoma Tax Commission, ___ U. S. ___, 115 S. Ct. 2351, 2356 (1995)(copy attached). The Department can not be sued in either a Florida or Federal Court under 42 U. S. C. § 1983.

(d) Federal Courts have held that an aggrieved taxpayer has adequate remedies under Florida law. See, e.g.,

Osceola v. Florida Department of Revenue, 893 F. 2d 1231, 1233 (11th Cir. 1990).

(e) Therefore, this Court lacks jurisdiction over the subject matter. Since this Court has no jurisdiction to entertain a 42 U. S. C. § 1983 claim in a state court on a state tax matter, it has no jurisdiction to entertain a request for attorney's fees sought under 42 U. S. C. § 1988.

First Amendment Claim

24. Newsweek has failed to state a claim upon which relief may be granted because the application of sales tax to Newsweek does not constitute a discriminatory and impermissible burden on Newsweek's right to free speech. Leathers v. Medlock, 499 U. S. 439, 111 S. Ct. 1438, 1447 (1991); Department of Revenue v. Magazine Publishers of America, Inc., 604 So. 2d 459, 461 (Fla. 1992).

The Comptroller

25. Although named as a party defendant, Newsweek has failed to allege any wrongdoing on the part of the Comptroller, nor does Newsweek seek any relief from the Comptroller.

26. The Comptroller has delegated to the Department of Revenue, pursuant to § 215.26(2), Fla. Stat., the authority to accept applications for the refund of taxes and to make determinations of the amount of refund due. See, Fla.

Admin. Code Rule 3A-44.020. Newsweek failed to allege that the Comptroller accepted a refund application or made a determination on the refund application at issue in the above styled case. Newsweek failed to state a claim against the Comptroller for which this Court may grant relief. Therefore, based upon the foregoing, the Department requests that this Court enter an Order dismissing the Comptroller as a party defendant in the present action.

Wherefore, the Department requests that this Court enter an Order granting the Departments' Motion for Summary Judgment.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

/S
Jarrell L. Murchison
Assistant Attorney General
Fla. Bar No. 182894

Joseph C. Mellichamp, III
Sr. Assistant Attorney General
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Office of the Attorney General
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(904) 487-2142
(904) 488-5865 (FAX)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of

foregoing has been sent by **HAND DELIVERY** to: **Mark E. Holcomb** and **James M. Ervin, Jr.**, HOLLAND & KNIGHT, 315 South Calhoun Street, Suite 600, Tallahassee, Florida 32301 this _____ day of November, 1995.

/S/
Jarrell L. Murchison
Assistant Attorney General

APPENDIX 3

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

NEWSWEEK, INC.,

Plaintiff,

v. CASE NO. 95-1971

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, a state agency,
and-
LAWRENCE H. FUCHS, as
Executive Director of the
Department of Revenue of the
State of Florida,
-and-
ROBERT F. MILLIGAN, as
Comptroller of the State of Florida,
Defendants.

_____/

FINAL SUMMARY JUDGMENT

On November 29, 1995, the above styled case was heard before this Court on Plaintiff's Motion for Summary Judgment as to Count I of the Complaint and Defendants' Motion for Summary Judgment. This Court finds that there are no issues of material fact involved and that summary judgment is appropriate for this case. Having reviewed the documents, pleadings and memoranda of law filed in this case by the parties and having heard the arguments of counsel in this case, it is

ORDERED AND ADJUDGED

1. Plaintiff's Motion for Summary Judgment as to Count I of the Complaint is hereby denied.

2. Defendants' Motion for Summary Judgment, for the reasons, arguments and the authorities contained therein, is hereby granted.

3. Each side shall bear its own costs and attorneys fees.

4. Plaintiff shall take nothing from this action.

5. Defendants shall go hence without day.

DONE AND ORDERED this 12th day of April,

1996.

WILLIAM GARY
CIRCUIT COURT JUDGE

Copies furnished to:

Mark E. Holcomb & James M. Ervin, Jr.
HOLLAND & KNIGHT
315 South Calhoun St., Ste. 600
Tallahassee, FL 32301

Jerrell L. Murchison
Joseph C. Mellichamp, III, and
Eric J. Taylor
Office of the Attorney General
The Capitol - Tax Section
Tallahassee, FL 32399-1050

APPENDIX 4

AFFIDAVIT

TO WHOM IT MAY CONCERN

This is to certify that the undersigned ROBERT H. KRONMILLER is the Chief, Bureau of Auditing, Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, State of Florida. Affiant has earned a Bachelor of Science degree in accounting from the University of Florida. After four years as an accountant in private practice, Affiant accepted employment with the Bureau of Auditing, Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, State of Florida, and has been for fifteen years continuously so employed. For the past three years Affiant has been the Chief, Bureau of Auditing.

During the period 1985-1988, Affiant was a Tax Audit Specialist 3, and was the number two person in the Bureau of Auditing of the Division of Alcoholic Beverages and Tobacco. Affiant reported to the Bureau Chief, Pedro M. Gonzalez, during the period 1985-1988.

As a Tax Audit Specialist 3, and as the number two person in the Bureau, Affiant was required to be familiar with tobacco and alcoholic beverage tax law, to include Chapters 85-203 and 85-204, Laws of Florida, which were subsequently codified in Sections 564.06 and 565.12, Florida Statutes (1985). Affiant is and was aware that these statutes establish basic tax rates per gallon of wine and distilled spirits. Affiant is and was further aware that these basic tax rates did not apply to wine or

distilled spirits manufactured from certain agricultural products designated in the statutes. The Legislature established lower tax rates for wine and distilled spirits manufactured from the designated agricultural products. The aforementioned statutes did not require that distributors carry the wine and/or distilled spirits manufactured from the agricultural products designated in the statutes, but rather provided a preferred tax rate to those distributors that opted to carry products manufactured from the designated agricultural products.

As a Tax Audit Specialist 3, and as the number two person in the Bureau of Auditing, Affiant was required to be familiar with procedures for reporting and collecting alcoholic beverage taxes, which procedures it should be noted, have changed but little since 1985. Section 561.50 and 561.55, Florida Statutes, require that the distributors prepare, on forms provided by the Division of Alcoholic Beverages and Tobacco, monthly reports of sales, from which the distributors compute their tax liability. The tax is remitted to the Division of Alcoholic Beverages and Tobacco, along with the monthly report, on or before the 10th of each month. Copies of the current forms provided to the distributors are attached. The substance of these forms has remained basically constant since 1985. The information on the forms, and the tax computed comes from the distributor who prepares the forms, and remits the tax to the Division of Alcoholic Beverages and Tobacco.

Affiant, as Bureau Chief, is also the custodian of the official records of the Bureau of Auditing of the Division of Alcoholic Beverages and Tobacco. Among the official records

in Affiant's custody are each monthly report from each distributor submitted during the period from July 1, 1985 through June 30, 1988. These monthly reports of the distributors were the bases for the decisions of the Division of Alcoholic Beverages and Tobacco regarding which distributors to assess, and the amount of each assessment. In early April, 1991, assessments were prepared and mailed, return receipt requested, to those distributors who dealt in preferred products. The assessments were computed from the distributors' monthly report as follows:

a. The amount of taxes due to the Division during the period July 1, 1985 through June 30, 1988, at the highest rate prescribed by Sections 564.06 and 565.12, Florida Statutes (1985), was determined;

b. Breakage, spoilage, revenue adjustments, and discounts were then subtracted from the figure described in paragraph a, supra; and

c. The assessment was determined by subtracting the actual taxes paid to the Division at the preferred rate, from the figure determined in paragraph a, supra, minus the breakage, spoilage, revenue adjustments, and discounts, as set forth in paragraph b, supra.

Copies of the assessments are submitted herewith as part of the Affidavit. The following assessed distributors are paying, or have paid their assessment:

1. Century Cellars, Inc.
2. International Wine and Liquor
3. Todhunter International

4. McKesson Wine and Spirits
5. Apex Distributing Company
6. Gulfside Distributors
7. R.M. Distributors, Inc.
8. Spearman Distributors
9. Sutton Distributing Company

The following assessed distributors received notice, did not challenge the assessment, and had not paid:

1. Florida West Coast Beverage Distributors, Inc. f/k/a/ Tampa Wholesale Companies:
2. Antares, Inc.
3. Gator Distributors, Inc., Fort Walton Beach;
4. Gator Distributors, Inc., Pensacola Florida;
5. Panama Beverage Company;
6. S.R. Perrot, Inc.;
7. Florida Brewery;
8. Fruit Wine/House of Midulla; and
9. Grantham Wine.

An assessment against Lafayette Vineyards and Winery, Inc. was prepared but not served due to an ongoing bankruptcy action. An assessment mailed to House of Midulla care of Tampa Wholesale in Ft. Myers was returned as being undeliverable. Finally, thirty-two distributors are challenging their assessments in the Circuit Court action.

To recapitulate, nine distributors have paid, or are paying their assessments; nine distributors received assessments which they neither paid nor challenged; one assessed distributor is in bankruptcy; one distributor's assessment was returned

undeliverable; and thirty-two distributors are challenging their assessments in circuit court.

FURTHER AFFIANT SAYETH NAUGHT.

ATTEST my hand and official seal this 20th day of May, 1992.

/S/
ROBERT H. KRONMILLER
CHIEF, BUREAU OF AUDITING
DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO
Department of Business Regulation
725 South Bronough Street
Tallahassee, FL 32399-1007

Sworn to and described before me
this 20th day of May,
1992.

/s/
(Signature of Notary Public,
State of Florida)

Notary Public, State of Florida
Commission Expires Aug. 7, 1994

Janice S. Joanos
(Print, type or stamp commissioned
name of Notary Public)

Personally known _____ or
Produced Identification __X__
(Check One)

Type of Identification Produced:

State of Florida Drivers License

APPENDIX 5

Copyright (c) West Group 1997 No claim to original U.S. Govt. works

643 So.2d 16, Division of Alcoholic Beverages and Tobacco v. McKesson Corp., (Fla.App. 1 Dist. 1994)

*16 643 So.2d 16

19 Fla. L. Weekly D1958

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, Department of Business Regulation; and Office of theComptroller, State of Florida, Appellants/Cross-Appellees,

v.

McKESSON CORPORATION; Florida West Coast Beverage Distributors, Inc.; Grantham Distributing Company, Inc.; and Tampa Crown Distributors, Inc., Appellees/Cross-Appellants.

No. 93-1703.

District Court of Appeal of Florida,
First District.

Sept. 7, 1994.

Rehearing Denied Oct. 31, 1994.

Wholesaler liquor distributors brought separate actions challenging Florida excise tax which gave preferential treatment to alcoholic beverages manufactured from Florida agricultural crops and bottled in state. The Circuit Court, Leon County, Charles E. Miner, Jr., J., invalidated tax scheme on commerce clause grounds, but made its rulings perspective in

nature, and both sides appealed. Consolidating cases for purposes of appeal, the District Court of Appeal certified action to Supreme Court, which affirmed, 524 So.2d 1000. Certiorari was granted on petition of one of the distributors, and the Supreme Court, 110 S.Ct. 2238, reversed and remanded for further proceedings on petitioning distributor's available remedies. Following remand from the Supreme Court, 574 So.2d 114, the Circuit Court, P. Kevin Davey, J., granted second distributor's petition to appear, and state appealed. The District Court of Appeal, Ervin, J., held that, even assuming that nonpetitioning distributor was automatically deemed party to proceedings before United States Supreme Court, distributor had to take some further action in Supreme Court in order to preserve his entitlement to any relief which Supreme Court granted.

Reversed and remanded.

FEDERAL COURTS k507
170B ----
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk507 Right of review and parties.

Fla.App. 1 Dist. 1994.

Even assuming that taxpayer, whose case was consolidated on appeal with that of another taxpayer challenging Florida tax, was automatically deemed party to this other taxpayer's petition for writ of certiorari to the United States Supreme Court, first taxpayer had to take some further action in Supreme Court, by filing notice informing clerk of its continuing interest in case or

brief adopting second taxpayer's brief, in order to preserve its entitlement to relief granted by United States Supreme Court on second taxpayer's petition. U.S.Sup.Ct.Rule 12.4, 28 U.S.C.A.

***17** Jack L. McRay, Gen. Counsel, John B. Fretwell, Deputy Gen. Counsel, William B. Nickell, Asst. Gen. Counsel, Dept. of Business and Professional Regulation, Tallahassee, Robert A. Butterworth, Atty. Gen., Joseph C. Mellichamp, III, Sr. Asst. Atty. Gen., Eric J. Taylor, Asst. Atty., Office of the Atty. Gen., Tax Section, Tallahassee, for appellants/cross-appellees.

David G. Robertson and Paul T. Lufkin of Morrison & Foerster, San Francisco, CA, Charles Wachter and Thomas T. Steele of Fowler, White, Gillen, Boggs, Villareal & Banker, Tampa; M. Stephen Turner of Broad & Cassel, J. Riley Davis, Gary R. Rutledge and Paul Ezatoff of Katz, Kutter, Haigler, Alderman, Davis, Marks & Rutledge, Tallahassee, James L. Chase of James L. Chase, P.A., Richard A. Arnold and Scott E. Perwin of Kenny, Nachwalter, Seymour & Arnold, Pensacola, John D. Beasley of Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, John McNeel Breckenridge, Jr. of The Breckenridge Group, Tampa, Geoffrey Todd Hodges and Gregory P. Hansel of Shackleford, Farrior, Stallings & Evans, P.A., Tampa, for Florida West Coast Beverage Distributors, Inc.

Michael P. McMahon and Virginia B. Townes of Akerman Senterfitt & Eidson, P.A., Orlando for Grantham Distributing Co., Inc.

Harold F.X. Purnell of Rutledge, Ecenia, Underwood and Purnell, P.A., Tallahassee, for Tampa Crown Distributors, Inc., for appellees/cross-appellants.

ERVIN, Judge.

Although numerous issues have been raised in this appeal, we conclude that as a result of agreements entered between appellant, the Division of Alcoholic Beverages and Tobacco, and various appellees, the only issue now requiring resolution is whether appellee Tampa Crown Distributors, Inc., retains

standing as a party to this appeal. Having decided that Tampa Crown has no interest remaining in the present litigation, we reverse the trial court's order granting partial summary judgment in Tampa Crown's favor and remand with directions that judgment be entered for the Division.

The history of this case is well documented in the numerous published opinions, to wit: Division of Alcoholic Beverages & Tobacco v. McKesson Corp., 524 So.2d 1000 (Fla.1988) (McKesson I); McKesson Corp. v. Division *18 of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990) (McKesson II); and Division of Alcoholic Beverages & Tobacco v. McKesson Corp., 574 So.2d 114 (Fla.1991) (McKesson III). Consequently, this opinion summarizes only those facts necessary to our decision in the present appeal.

McKesson Corporation and Tampa Crown Distributors, licensed wholesale distributors of alcoholic beverages in Florida, separately challenged sections 564.06 and 565.12, Florida Statutes (1985), providing for preferential tax treatment to domestic distributors of alcoholic beverages manufactured from products grown in Florida. The trial court entered final and partial summary judgments in favor of Tampa Crown and McKesson, respectively, invalidating the discriminatory taxing scheme on Commerce Clause grounds, but made its rulings

prospective in nature, causing it to deny the distributors' tax refund requests. The Division appealed the Commerce Clause rulings, and Tampa Crown and McKesson cross-appealed the prospective application rulings. This court consolidated the two cases and certified the case to the Florida Supreme Court, which affirmed the trial court's rulings in McKesson I.

McKesson alone filed a petition for writ of certiorari in the United States Supreme Court, which agreed that the taxing scheme violated the Commerce Clause, but struck that portion of McKesson I which had granted only prospective relief. In order to provide McKesson with a clear and certain remedy for the past discrimination, the Court suggested the following three remedies: that the state refund McKesson the difference between the tax it had paid and the tax it would have paid had it received the preferential tax rate; that it assess and collect back taxes from McKesson's competitors which had benefited from the rate reductions; and, finally, that it consider a combination of a partial refund to McKesson and a partial retroactive assessment of tax increases on the favored competitors. McKesson II.

Following remand of the case to the Florida Supreme Court, the Division announced that it proposed to assess back taxes against all distributors which had received preferential tax treatment. The court thereupon remanded the case to the trial

court to determine whether the chosen remedy satisfied minimum constitutional requirements. McKesson III. Thereafter the Division implemented its policy decision by adopting emergency rules outlining the procedure for retroactively assessing and collecting taxes from McKesson's competitors which had benefited from the unconstitutional tax scheme. See 17 Fla.Admin. Weekly 1626-28 (Apr. 12, 1991) (Emergency Rules 7AER91-8 to 10). Tampa Crown filed a petition before the trial court on remand, seeking to appear in the proceeding on the ground that it was a party and would be substantially affected by the outcome. The Division opposed the petition, arguing that only those distributors which had retroactive tax assessments entered against them had standing to intervene, and that Tampa Crown, neither having sold any of the preferred products, nor assessed against it any back tax and seeking only a refund, lacked intervenor status. Additionally, the Division asserted that because Tampa Crown had not pursued an appeal to the United States Supreme Court, as had McKesson, McKesson I was res judicata insofar as Tampa Crown's claim for relief. Tampa Crown answered that it was clearly affected, because it was one of the parties that had been wrongfully discriminated against, and it was entitled, as was McKesson, to a clear and certain remedy. The trial court granted Tampa Crown's petition and allowed it to appear for the

limited purpose, within the confines of the Supreme Court's mandate, of presenting argument against the remedy chosen by the state. The question now before us concerns the propriety of the lower court's ruling.

Tampa Crown contends that it has standing based on United States Supreme Court Rule 12.4 (formerly known as rule 19.6). This rule, involving certiorari review, provides:

> All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner shall notify the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below *19 has no interest in the outcome of the petition.

Initially, we question whether the above rule applies or whether rule 12.2, formerly known as rule 19.4, is applicable. Rule 12.2 states that parties who are "interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition." As explained in Supreme Court Practice Sec. 6.22 (7th ed. 1993), by Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller, rule 12.2 is implicated once cases have been consolidated. The instant case appears to fall somewhere between the two rules; it involves separate suits and judgments brought in the trial court, which were thereafter consolidated in the appellate court, thereby suggesting the application of rule 12.2. The case also involves one proceeding

and one judgment in the Florida Supreme Court (McKesson I), hence implying the applicability of rule 12.4. If we were to apply the provisions of rule 12.2 to the instant case, Tampa Crown could not be deemed a party to the case filed in the United States Supreme Court, as it neither filed its own petition nor joined in McKesson's petition before the Court. As a result, it could not be considered a party to McKesson II, or McKesson III for that matter, and the decision in McKesson I holding the statutory taxing scheme unconstitutional, but making the decision prospective in its application, must be considered res judicata as to the rights of Tampa Crown. Thus, the resolution to the issue of Tampa Crown's standing to seek a refund turns on the applicability of rule 12.4.

Although rule 12.4 offers superficial support to Tampa Crown's position, we nevertheless conclude that Tampa Crown was required to take some affirmative act before the United States Supreme Court in order for its refund request to survive. Section 6.20 of Supreme Court Practice explains that rule 12.4 is applicable once the petitioner fails, either intentionally or accidentally, to name a party who was involved in the proceeding below and who still retains an interest in the case. Under this rule, any party before an inferior tribunal is automatically made a party before the Supreme Court without the necessity of such party filing any motion to be named or

added as a party. The authors point out, however, that the party should notify the clerk and any other parties that he or she has an interest in the outcome of the case and intends to participate as a party under rule 12.4. Although the rule provides that the unnamed party is assigned the role of respondent, regardless of that party's interest, he or she is free to file a response or brief appropriate to his or her position.

We have found no cases directly on point; however, after reviewing several of the cases cited in Supreme Court Practice, we conclude that even if Tampa Crown were automatically made a party under rule 12.4, in order for its claim for relief to prevail, Tampa Crown was required to take further action in the Supreme Court, by filing either a notice informing the clerk of its continuing interest in the case or a brief adopting McKesson's brief. See Stern, Gressman, Shapiro & Geller, Supreme Court Practice Sec. 6.20 (7th ed. 1993). For example, in Director, Office of Workers' Compensation Programs v. Perini North River Associates, 459 U.S. 297, 304 n. 12, 103 S.Ct. 634, 640 n. 12, 74 L.Ed.2d 465, 472 n. 12 (1983), the party that was made a respondent by virtue of rule 12.4 demonstrated its continued stake in the outcome by filing in support of the petitioner at both the certiorari and merit stages of the proceedings. In Washington v. Davis, 426 U.S. 229, 237 n. 7, 96 S.Ct. 2040, 2046 n. 7, 48 L.Ed.2d 597, 606 n. 7 (1976),

the party named respondent filed a brief pursuant to rule 12.4, and in Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 263 & n. 12, 111 S.Ct. 2298, 2305 & n. 12, 115 L.Ed.2d 236, 251 & n. 12 (1991), the party designated a respondent under rule 12.4 filed a brief arguing its position. Similarly, in Mullins Coal Co., Inc. of Virginia v. Director, Office of Workers' Compensation Programs, 484 U.S. 135, 140 n. 8, 108 S.Ct. 427, 430-31 n. 8, 98 L.Ed.2d 450, 458-59 n. 8 (1987), both an employee and his employer appeared before the United States Supreme Court as respondents pursuant to rule 19.6, and each actively participated, albeit on opposing sides.

***20.** Tampa Crown has not contended that it filed a petition with the United States Supreme Court or that it joined in McKesson's petition. Nor has it asserted that it did anything before the Supreme Court, such as filing a notice to assert its continuing interest, or a brief in support of McKesson's position. Finally, nothing in McKesson II discloses that Tampa Crown was either a petitioner or a respondent, and its attorney is not referenced. Under the circumstances, we conclude that Tampa Crown has failed to establish that it was a party before the Supreme Court in McKesson II, and, therefore, it has no entitlement to any of the possible avenues of relief which the Court outlined therein.

On this point, we found O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980), particularly instructive. That case involved the decertification of a nursing home as a provider under certain Medicare/Medicaid agreements with the Department of Housing, Education and Welfare (HEW) and the Pennsylvania Department of Public Works (DPW). The nursing home and six Medicaid patients thereafter filed an action in district court, claiming that they were entitled to an evidentiary hearing on the merits of the decertification before the Medicaid payments could be stopped. The proceedings culminated with an order in which, among other things, the court dissolved an injunction which had required HEW and DPW to continue the payments; however, HEW and DPW were required to pay for services which had actually been provided to the patients. The nursing home and patients appealed portions of the order adverse to them, while HEW cross-appealed that part requiring HEW and DPW to pay for actual services rendered. Although DPW was named as an appellee, it failed to take any action in the appeal. The Court of Appeals reversed that part of the order dissolving the injunction, thereby requiring HEW and DPW to continue paying Medicaid benefits until the patients were granted a hearing, and it affirmed that portion directing HEW and DPW to pay for the actual services provided. DPW then filed a

petition for certiorari to the United States Supreme Court. In footnote 14, the Court explained that because DPW did not cross-appeal the district court's ruling requiring it to make payments for actual services provided to the patients, it effectively accepted the court's directive. DPW's petition for certiorari, therefore, could not revive the issue of the propriety of that portion of the order. Id. at 783 n. 14, 100 S.Ct. at 2474 n. 14, 65 L.Ed.2d at 516-17 n. 14.

An analogy from the above case can be made to the facts in the instant case. Because Tampa Crown did not seek review in the United States Supreme Court of the Florida Supreme Court's decision making its rulings prospective, Tampa Crown must be considered to have accepted that decision and, therefore, to have no interest in any remaining litigation. As a consequence, the decision in McKesson I, which denied the distributors' refund requests by virtue of the prospective nature of its ruling, is res judicata as to Tampa Crown.

REVERSED and REMANDED with directions that judgment be entered for the Division.

WOLF and KAHN, JJ., concur.

APPENDIX 6

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF
FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

NEWSWEEK, INC.,

Appellant,

v CASE NO. 96-1882

DEPARTMENT OF REVENUE OF
THE STATE OF FLORIDA,
LAWRENCE H. FUCHS and
ROBERT F. MILLIGAN,

Appellees.

_____/

Opinion filed February 18, 1997.

An appeal from the Circuit Court
for Leon County.Judge William Gary.

Mark E. Holcomb, James M. Ervin, Jr.,
and Susan L. Turner of Holland & Knight,
Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General;
Jarrell L. Murchison and Eric J. Taylor,
Assistant Attorneys General;
Joseph C. Mellichamp, III,
Senior Assistant Attorney General,
Tallahassee, for Appellees.

BARFIELD, C.J.

Newsweek, Inc., appeals a final order in which the circuit court denied Newsweek's motion for summary judgment and granted the cross-motion for summary judgment of defendants Lawrence H. Fuchs, as Executive Director of the Department of Revenue, Robert F. Milligan, as Comptroller of the State of Florida, and the Florida Department of Revenue (collectively referred to as the Department), thereby denying Newsweek's request for a tax refund. Because we find no due process violation in the State's failing to provide a refund or other retroactive relief where Newsweek had an adequate predeprivation remedy, we affirm.

Effective July 1, 1987, the Legislature imposed a sales tax on newspapers and magazines. § 212.05(1)(i), Fla. Stat. (1987). Beginning January 1, 1988, the Legislature exempted newspapers from that tax. § 212.08(7)(w), Fla. Stat. (Supp. 1988). The retail sale of magazines remained subject to sales tax under section 212.05(1)(i), Florida Statutes (Supp. 1988). Magazine Publishers of America, Inc. (an association of which Newsweek is a member), and several individual publishers (but not Newsweek individually) challenged the constitutionality of this tax scheme. The trial court held the tax scheme unconstitutional, and that portion of the trial court's order was affirmed by the Florida Supreme Court in Department of Revenue v. Magazine Publishers of America, Inc., 565 So. 2d

1304 (Fla. 1990), cert. granted, judgment vacated sub nom. Miami Herald Pub. Co. v. Florida Dep't of Revenue, 499 U.S. 972 (1991). In its first opinion, the Florida Supreme Court held the relevant portions of chapter 212 invalid as violative of the First Amendment of the United States Constitution because it unconstitutionally differentiated between magazines and newspapers. The trial judge also ruled with Magazine Publishers that the appropriate remedy for this unlawful taxing scheme was to extend the exemption allowed newspapers by section 212.08(7)(w) to magazine publishers. The Supreme Court reversed that portion of the order, and ruled that the appropriate remedy was to strike the exemption enjoyed by newspapers and to apply the tax evenly. The United States Supreme Court granted certiorari and vacated the judgment for reconsideration in light of Leathers v. Medlock, 499 U.S. 439 (1991), in Miami Herald Pub. Co. v. Department of Revenue, 499 U.S. 972 (1991). On remand, the Florida Supreme Court again held the taxing scheme unconstitutional in Department of Revenue v. Magazine Publishers of America, Inc., 604 So. 2d 459 (Fla. 1992), affirming the ruling that the taxing scheme unconstitutionally violated the First Amendment because the discrimination between newspapers and magazines was content-based, but reversing the trial court's order to the extent that it held that magazines were entitled to the same exemption as newspapers. Again, the Florida Supreme Court explained that the Legislature had indicated its intent that the tax should

be imposed and that, if there was any invalidity in the taxing scheme, the exemption should fall rather than the tax. The Department has taxed both newspapers and magazines since December 9, 1990. See Fla. Admin. Code R. 12A-1.008(1)(a)(1994).

Newsweek filed a timely claim for a refund of sales tax paid between January 1, 1988, and December 9, 1990. That refund claim was denied on February 26, 1995. Newsweek then filed an action in circuit court, seeking the refund. Relying upon the holding of the Florida Supreme Court in Florida Dep't of Revenue v. Magazine Publishers of America, Inc., 604 So. 2d 459 (Fla. 1992), Newsweek's complaint alleged that the imposition of sales tax on magazines but not upon newspapers in the period between January 1, 1988, and December 9, 1990, was unconstitutional. Count I of the complaint claimed that Newsweek was entitled to a refund of sales tax paid in that interim under the Due Process Clauses of the United States and Florida Constitutions. Count II claimed that the denial of the refund violated section 1983 of Title 42 of the United States Code.[4] Newsweek moved for summary judgment on the basis

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[4]Newsweek has not appealed the circuit court's order granting summary judgment as to Count II. See Witmer v. University of Florida Police Department, 610 So. 2d 87, 88 (Fla. 1st DCA 1992)(affirming order granting motion to dismiss "to the extent it dismisses the section 1983 action against the state and its officers sued in their official capacity").

of Count I only, asserting that Due Process required retroactive relief as a matter of law. That motion was denied.

We must affirm if the trial court was correct for any reason. As the Florida Supreme Court explained in Chase v. Cowart, 102 So. 2d 147, 150 (Fla. 1958):

> Decrees and judgments in cases which come to an appellate court for review are presumed to be correct and free from error. We are required to uphold the lower court if valid grounds exist therefor. While the grounds or reasoning used by the trial court or chancellor are frequently helpful to an appellate court on review, they are not controlling. The decision of the appellate court must be made, not on the basis of whether the trial court or chancellor traveled the proper route, used proper reasoning, or laid his conclusion on proper grounds, but rather on whether his conclusion is correct or incorrect.

See also DSA Group, Inc. v. Gonzalez, 555 So. 2d 1234 (Fla. 2d DCA 1989); Whitney v. State, 184 So. 2d 207, 209 (Fla. 3d DCA)(applying "doctrine that even if the wrong reasons were given [but] the right result was obtained, the order here under review should be affirmed"), cert. denied mem., 192 So. 2d 490 (Fla. 1966), cert. dismissed, 389 U.S. 138 (1967).

The trial court correctly ruled that Newsweek is not entitled to a refund under the Due Process Clauses of the United States and Florida Constitutions. Newsweek relies upon the holding in McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 31 (1990) that the Due

Process Clause requires "meaningful backward-looking relief" when a taxpayer is forced to pay a tax before having an opportunity to establish the unconstitutionality of that tax. Below the Department contended that McKesson is distinguishable because, while the liquor taxes at issue in McKesson were not encompassed within the procedures for predeprivation relief in chapter 72 of the Florida Statutes, the sales tax paid by Newsweek could properly have been contested in a predeprivation proceeding pursuant to section 72.011. We agree that McKesson is distinguishable because that holding was expressly predicated upon the fact that the taxpayer had no meaningful predeprivation remedy. The Court's holding was that states are obligated to provide a meaningful opportunity to secure postpayment relief when the state penalizes the taxpayer for failing to pay first and obtain review of the tax's validity later in a refund action. The penalties which the Supreme Court found coerced taxpayers into paying the tax before contesting the validity of the taxing scheme in McKesson included the possibility that the county sheriff could be directed "to levy upon and sell the delinquent taxpayer's goods and chattels to recover the amount of the unpaid tax plus a penalty of 50%, along with interest of 1% per month" as well as the possibility that the Division might revoke or decline to renew the distributor's license. McKesson, 496 U.S. at 38 n. 20.

In the present case, the taxpayer could have availed itself

of a predeprivation remedy under section 72.011, Florida Statutes (1987). Newsweek had the option of filing suit in circuit court to contest the legality of this tax and paying the amount of the contested tax into the registry of the court. See § 72.011(1), (3)(b). One who contests a tax and utilizes the procedure of paying the contested amount into the registry of the court cannot be said to have evaded the payment of the tax for purposes of liability for the penalty provided in section 212.12(2)(a), nor can the ultimate payment of such funds be considered "in jeopardy" for purposes of the provision in section 212.15(4) (under which a warrant may be issued for collection by the sheriff through levying upon the property of the taxpayer). The taxpayer retains the ownership of the funds paid into the registry of the court, as well as any interest earned on those monies. See Greco v. Tampa Wholesale Co., 522 So. 2d 506 (Fla. 2d DCA)(explaining that under Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) the funds deposited in the registry of the court did not become public funds, and that earnings thereon were an incident of the ownership of the funds), review denied mem., 531 So. 2d 168 (Fla. 1988), cert. denied mem., 488 U.S. 1006 (1989). Moreover, while section 28.33, Florida Statutes (1995) states, in pertinent part, that "[m]oneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk,. . . " the taxpayer also has the right to file a cash bond or surety bond in the amount of the contested

tax assessment, or to seek a court order approving an alternative arrangement. § 2.011(3)(b)2.; see also Don's Sod Co., Inc. v. Florida Dep't of Revenue, 661 So. 2d 896 (Fla. 5th DCA 1995). See generally Florida Dep't of Revenue v. Nu-Life Health and Fitness Center, 623 So. 2d 747 (Fla. 1st DCA 1992)(section 72.011 not an unconstitutional deprivation of access to courts, because the taxpayer has the alternative of seeking a waiver from the Department of the obligation to pay the contested tax into the registry of the court or to file a motion for court approval of an alternative security arrangment; also finding that there was no denial of access to courts because the taxpayer has the alternative of filing an administrative petition under chapter 120 without having to tender the amount of the contested tax). A taxpayer cannot reasonably be considered liable for penalties for availing himself of the procedure provided in chapter 72. See State ex rel. East Coast Lumber & Supply Co. v. Lee, 172 So. 722, 728 (Fla. 1937) (Davis, J., concurring). Thus, the coercive penalties which deprived the taxpayers in McKesson of any effective predeprivation remedy are not factors in this case. The taxpayers in McKesson were subject to onerous penalties if they did not pay the disputed tax before seeking a refund in a proceeding contesting the constitutionality of the tax. They had no predeprivation remedy because section 72.011 was not available to contest the liquor taxes at issue in that case; for that reason, McKesson is inapplicable.

Accordingly, we AFFIRM the order denying Newsweek's motion for summary judgment and granting final summary judgment to the defendants.

DAVIS, J., CONCURS WITH WRITTEN OPINION; BENTON, J., CONCURS IN RESULT WITH WRITTEN OPINION.

DAVIS, J., Concurring.

I agree with the decision holding that Newsweek's Due Process rights were not violated by the state's refusal to provide a refund or other retroactive relief to Newsweek. In addition, I believe there is a valid alternative basis for finding McKesson distinguishable and affirming the trial court. In McKesson, the taxpayers filed suit challenging the constitutionality of the taxing scheme and seeking a refund of the taxes paid pursuant to that scheme. The Supreme Court was required to consider the proper remedy for the constitutional violation established in that very case. In contrast, Newsweek asserts that it was not a party to the Magazine Publishers case in which the unconstitutionality of this taxing scheme was determined. Thus, the issue presented in the instant case is not the one found in McKesson (i.e.: the correct remedy to be afforded to the party who has established the unconstitutionality of the tax scheme), but rather whether the Magazine Publishers decision invalidating the tax scheme should be applied retroactively to justify a refund action by one who was not a party to the first case.

In American Trucking Ass'n, Inc. v. Smith, 496 U.S. 167 (1990), the Court held that taxpayers were not entitled to have an intervening case in which the unconstitutionality of a tax was decided applied retroactively to authorize refunds of the tax they had paid while the statute was believed to be valid. American Trucking explains that equitable considerations are relevant to the determination whether a decision should be applied retroactively. 496 U.S. at 179. Just as this court reasoned in Dryden v. Madison County, 672 So. 2d 840, 843 (Fla. 1st DCA), review granted mem., 678 So. 2d 338 (Fla. 1996), McKesson did not over-rule Gulesian v. Dade County School Board, 281 So. 2d 325 (Fla. 1973) in which the court held that equitable considerations justified the denial of refunds of an unconstitutional tax. See also Martinez v. Scanlan, 582 So. 2d 1167, 1174, 1175 n. 7 (Fla. 1991) (citing both Gulesian and McKesson). The taxing scheme contested successfully in Magazine Publishers was facially content-neutral. It was invalidated because a rule promulgated by the Department of Revenue established that the statutory scheme was being applied discriminatorily based upon content in violation of the First Amendment. Magazine Publishers, 604 So. 2d at 461-62. Equitable considerations do not justify the retroactive application of the Magazine Publishers decision in refund actions brought by taxpayers who were not parties to the Magazine Publishers suit, based upon the fact that this statute was facially content-neutral as well as the Leathers v. Medlock,

499 U.S. 439 (1991) decision holding that distinctions in taxation between different types of media are not necessarily violative of the First Amendment.

BENTON, J., concurring in result.

I concur on the narrow ground that sections 72.011(1) and 120.575, Florida Statutes (1987), taken together, "provided a fair and meaningful predeprivation procedure," McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 38 n.21, 110 S. Ct. 2238, 2251, 110 L. Ed. 2d 17 (1990), which the taxpayer bypassed at its peril.